BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001-8002

DATE: March 21, 1997

CASE NO: 94-INA-597

In the Matter of:

PARKINSON CONSTRUCTION COMPANY,
Employer,

On Behalf of:

JEREMIAH M. WILLIAMS,
Alien.

Appearance: Tushinde C. Cooper
Hyattsville, MD
for the Employer and the Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Jeremiah M. Williams (“Alien") filed by Employer Parkinson Construction Co. ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, PA, denied the application and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the

alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 10, 1993, as amended, Employer filed an application for labor certification to enable the Alien, a Sierra Leonean national, to fill the position of "Project Administrator." Seven years of grade school, twelve years (***sic***) of high school, four years of college, with a Bachelor's degree in Education/Administration, and two years experience in the job offered or one year in the related occupation of "Construction Administrator" were required. The job offered was described as:

> Responsible for planning, implementation and evaluation of all projects.
> -Interpret[] contracts
> -Lia[i]son with contractor and company employees in the field
> -Comply with government orders
> -Supervi[s]e and train field and office employees
> -Manage a[n] office

(AF 63). There were no Special Requirements.

A transmittal form from the state agency indicated that as posted and advertised the salary and experience requirements were not as amended. The job was advertised at a salary of $600 weekly instead of the prevailing wage of $16.38 hourly, and two years of "experience in Teaching" was required. (AF 52, 57, 59). The Employer had, however, prior to the amendment, requested that further recruitment be waived. (AF 58).

On April 11, 1994, the CO issued a Notice of Findings in which he notified the Employer of the Department of Labor's intention to deny the application on several bases. Specifically, the CO determined that (1) the requirement of a Bachelor's Degree in Education/Administration and the advertised experience requirement of two years Teaching experience were unduly restrictive and appeared to be tailored to the Alien's experience (citing 20 C.F.R. § 656.21(b)(2)); and (2) there was no lawful, job-related

basis for rejecting one of the U.S. applicants, William Ethan Benso, as he appeared to be qualified for the position (citing 20 C.F.R. §§ 656.20(c)(8), 656.21(b)(6), and 656.24(b)(2)(ii)). (AF 49-51).

The Employer submitted its rebuttal on May 17, 1994 through the letter of its representative and the supporting letter of the Employer's Vice President/Treasurer. The Employer asserted there was a business necessity for the educational and experience requirements and explained why it believed applicant Benso to be unqualified. (AF 45-48).

On July 11, 1994, the CO issued a Final Determination in which he found the Employer's rebuttal unpersuasive and denied the application on the grounds originally stated. (AF 41-44).

The Employer and the Alien, through their representative, requested review of that denial on August 10, 1994 and submitted additional information. (AF 1-40).

DISCUSSION

The CO denied the application on two bases -- failure to establish business necessity for an unduly restrictive job requirement and failure to establish a lawful, job-related reason for rejecting a qualified U.S. applicant.

Rejection of Qualified U.S. Applicant

One of the two bases upon which the CO denied the application was the Employer's rejection of an ostensibly qualified U.S. applicant, William Benso.

Section 656.21(b)(6)[1] provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-related reasons; section 656.20(c)(8) provides that the application must show the job opportunity has been and is open to any qualified U.S. worker; and section 656.21(j) requires the employer to provide the local office with a written report of the results of the employer's post-application recruitment efforts. Under section 656.24(b)(2)(ii), the CO's determination whether to grant labor certification is made on the basis of whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity; such worker will be considered able and qualified if "by education, training, experience, or a combination thereof, [the worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

[1] All section references are to title 20 of the Code of Federal Regulations.

In general, an applicant is considered qualified for the job if he or she meets the minimum requirements specified by an employer's application for labor certification. ***The Worcester Co, Inc.,*** 93-INA-270 (Dec. 2, 1994); ***First Michigan Bank Corp.,*** 92-INA-256 (July 28, 1994). It is well settled that an employer may reject an applicant who does not meet unchallenged job requirements. ***See Bronx Medical and Dental Clinic***, 90-INA-479 (Oct. 30, 1993) (***en banc***); ***AFS Intercultural Programs***, 92-INA-358 (May 11, 1994); ***O. Thompson Co.,*** 91-INA-350 (May 26, 1993). Panels of the Board have also held that when an applicant fails to satisfy the minimum requirements, the burden shifts to the CO to prove that the applicant is qualified (in accordance with 20 C.F.R. § 656.24(b)(ii)). , ***See, e.g., Mindcraft Software, Inc.***, 90-INA-328 (Oct. 2, 1991); ***Houston Music Institute, Inc***., 90-INA-450 (Feb. 21, 1991). ***See also Unisys***, 87-INA-555 (April 6, 1988). Moreover, the plurality ***en banc*** opinion in ***Bronx Medical*** and panel decisions such as ***AFS Intercultural Programs***, 92-INA-358 (May 11, 1994) found U.S. applicants who did not satisfy specified job requirements to be properly rejected, notwithstanding the CO's assertion that the applicants were capable of performing the job.

While Applicant Benso's four years of experience with the Vitro Corporation appears to satisfy the experience requirements, he has a Bachelor of Arts in Mathematics and Political Science and thus does not meet one of the educational requirements for the position. (AF 62). Accordingly, if this requirement was not restrictive, the Employer had a valid basis for rejecting the applicant.

Unduly Restrictive Requirements/Business Necessity

The other basis upon which the CO denied the application was that the requirement of a Bachelor's Degree in Education/Administration was unduly restrictive and appeared to be tailored to the Alien's experience (citing 20 C.F.R. § 656.21(b)(2)).[2] That section requires, ***inter alia***, a showing of business necessity for requirements that are not normal for jobs in the United States or that are not defined for the job in the ***Dictionary of Occupational Titles***. ***See, e.g., Ivy Cheng,*** 93-INA-106 (June 28, 1994); ***A-Transmission Discount,*** 88-INA-118 (March 27, 1990); ***Manuel Reyes***,
89-INA-89 (Nov. 29, 1989). In order to establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to perform, in a reasonable manner, the job duties as described by the employer. ***In re Information Industries, Inc.***, 88-INA-82 (Feb. 8, 1989) (***en banc***).

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[2] In the Notice of Findings, the CO also noted that the advertised experience requirement of two years Teaching experience was unduly restrictive but, while mentioning this requirement, does not appear to have relied upon it as a ground for denial in the Final Determination. (AF 42, 50).

Although the education and experience requirements are not excessive under the ***Dictionary of Occupational Titles*** (DOT), the CO has challenged the specific requirement of a degree in Education/Administration, which is neither specifically listed in the DOT nor normal for the job of project administrator. Once a job requirement is challenged by the CO as not being normally required for the job or within the DOT, the burden shifts to the employer to establish business necessity. ***Escalen Institute Soviet American Exchange Program,*** 92-INA-401 (Dec. 28, 1994). We agree with the CO that the Employer has failed to satisfy this burden.

Here, in its rebuttal, the Employer asserts that because it is certified by the State of Maryland to conduct and maintain programs of apprenticeship and training in the construction field of bricklaying and masonry, it has a business necessity for an individual with the minimum qualification of a Bachelor's degree with a major in education/administration to fill the position of Project Administrator. In this regard, the Employer reasons that the process of writing, evaluating, and monitoring apprentice lesson plans (covering 465 projected hours of classroom instruction) would be best coordinated by someone with a background in education, especially vocational education. The Employer argues that degrees in business administration or construction engineering would not be more appropriate, because the company "is strictly masonry, concrete and brick work, a vocation out of the scope of a construction engineer." (AF 46).

The Employer's rebuttal is unconvincing, as the apprentice program and the need to write, evaluate, and monitor apprentice lesson plans are not referenced in the job duties, apart from general references to supervision and training of field and office employees and liaison with contractor and company employees in the field. Even if these vague references are deemed to incorporate the apprenticeship and training programs described by the Employer in its rebuttal, the Employer has at most met the first prong of the ***Information Industries*** test and has failed to show that a degree in Education/Administration is essential to perform, in a reasonable manner, the job duties as described by the employer, as required by the second prong.

In view of the above, the application should be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Parkinson Construction Company
(Alien: Jeremiah M. Williams)

Case No. : 94-INA-597

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: